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Conflict in the “Tranquil Gardens”:  
*Banks v. Housing Authority of San Francisco* and the Definition of Equality in  
Multi-Racial California

Reuel Schiller\*

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AUTHOR’S PERMISSION.

Charles Jung and Mattie Banks are hardly household names, even for people familiar with the politics of postwar San Francisco. In 1950, Jung, a business leader in Chinatown, became the first Chinese American appointed to the San Francisco Housing Authority, the agency that built and managed federally-funded public housing within the City. Banks was the lead plaintiff in the 1952 lawsuit brought by the National Association for the Advancement of Colored People (NAACP) that sought to have the Authority’s policy of segregating its housing projects by race declared unconstitutional. In the conventional story of the struggle for civil rights in the United States, both Jung and Banks are symbols of the successes that racial minorities achieved in the years following the Second World War. Jung was one of the first Chinese Americans to gain a modicum of political power in a City once renowned for its bitter hatred of the Chinese. Similarly, Banks’ lawsuit resulted in a judicial opinion prohibiting state discrimination in the provision of one of life’s most basic necessities, housing. Yet these two symbols of civil rights success were on opposite sides of the case. Jung served on the Authority when its members unanimously authorized a full and robust defense of the agency’s policy of segregation. Banks attacked that policy. Despite these antithetical positions in the litigation, both Jung and Banks believed that their actions promoted racial egalitarianism. Accordingly, an examination of the case that brought the two into conflict suggests that defining what racial

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egalitarianism meant in postwar America is a more complex task than historians have traditionally thought.

The study of the American Civil Rights Movement has undergone a dramatic transformation in the past two decades.<sup>1</sup> Until the 1990s, the reigning civil rights narrative portrayed the Movement as a religiously-based, southern phenomenon that began sometime in the early 1950s. According to this story, the Movement became more radical in the middle of the 1960s, as it adopted ideas of racial separatism and economic egalitarianism, and as it migrated out of the South. The Movement then splintered, collapsing in the late 1960s and early 1970s on the heels of Martin Luther King, Jr.'s assassination, self-destructive Black Panther afro-centrism, and white backlash in the face of forced busing and affirmative action. Even now, most high school and college-level American history textbooks portray the Civil Rights Movement in this fashion.

Modern scholars of civil rights have revised this story by expanding it in a variety of ways.<sup>2</sup> First of all, they have expanded it chronologically. African Americans and their white allies have continuously engaged in political and legal activities promoting some form of racial egalitarianism since the moment that slavery ended. Secondly, scholars have demonstrated that civil rights advocates subscribed to a broad variety of ideological beliefs, belying the simple Martin/Malcolm dichotomy that has plagued civil rights history. Over the history of the Movement there have been pacifist integrationists and militant separatists, to be sure. But there

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<sup>1</sup> For a brief summary of the contemporary state of civil rights historiography, see Reuel Schiller, "Law, Liberalism, and the New History of the Civil Rights Movement," 61 *Hastings L.J.* 1257 (2010); Reuel Schiller, "The Administrative State, Front and Center: Studying Law and Administration in Postwar America," 26 *Law and History Rev.* 415-17 (2008).

<sup>2</sup> For some signature examples see Thomas J. Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (2008); Mark Brilliant, *The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941-1978* (2010); Jacquelyn Dowd Hall, "The Long Civil Rights Movement and the Political Uses of the Past," 91 *Journal of American History* 1233 (2005); ADD OTHERS.

have also been radical Marxists, Christian pragmatists, trade unionists, and liberal pluralists. The Movement, to paraphrase Whitman, contained multitudes.

Historians have also recentered the Movement geographically, showing that it did not simply move from South to North, but that it instead developed simultaneously throughout the entire country, with different regional interests and tactics cross-fertilizing one another. Finally, historians of the Civil Rights Movement have begun to recognize that different minority communities within the United States have different civil rights stories. Blacks, Hispanics, and Asian Americans fought very different battles for civil rights, with different goals and tactics. Indeed, even within these broad ethnic and racial categories, various groups took strikingly different approaches to achieving equality.

The emergence of this new, more complete, civil rights history demands a new legal history of the Civil Rights Movement. The tired tale of *Plessy* to *Brown* to *Bakke* needs to be retired and replaced with a legal narrative that reflects the Movement's geographical, ideological, and ethno-racial diversity.<sup>3</sup> This essay is a modest contribution to that project. In *Banks v. Housing Authority of the City and County of San Francisco*, California courts held unconstitutional the Housing Authority's segregation of public housing, and its proportional allocation of such housing among the City's racial and ethnic groups.<sup>4</sup> While this case was a clear victory for Banks and the NAACP lawyers who brought the case, the response to it within San Francisco's Chinese American community was of dismay, not joy. The case thus illustrates

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<sup>3</sup> For the traditional tale see Urofsky [?]. For some excellent examples of legal history reflecting the true complexity of the Civil Rights Movement see Kenneth W. Mack, *Representing the Race: The Creation of the Civil Rights Lawyer* (2012); Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (2011); and Risa L. Goloboff, *The Lost Promise of Civil Rights* (2010). Sugrue, *Sweet Land of Liberty*, and Brilliant, *The Color of America Has Changed* also spend plenty of time focusing on legal issues. For an excellent historiographical essay on the subject see Ariela J. Gross' review of Nagin, *Courage to Dissent*, "From the Streets to the Courts: Doing Grassroots Legal History of the Civil Rights Era, 90 Tex. L.Rev. 1233 (2012).

<sup>4</sup> *Banks v. Housing Authority of City and County of San Francisco*, 120 Cal.App.2d 1 (1953).

the difficulties the Movement faced as it sought to further the value of racial egalitarianism in multiracial communities outside of the South. In the years immediately following the Second World War, equality meant different things to people of different races. As such, the legal definition of equality was fluid and contested. In the *Banks* case, California courts began the process of privileging one such definition. It was a definition, however, that the residents of San Francisco's Chinatown would resist.

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One morning in the fall of 1952, Mattie Banks rose early and made her way to the office of the San Francisco Housing Authority at 440 Turk Street.<sup>5</sup> That day the Housing Authority was to begin taking applications for a new public housing project, known as North Beach Place – a 101 unit building, sitting at the corner of Bay Street and Columbus Avenue in San Francisco's predominantly Italian North Beach neighborhood. Banks was an excellent candidate for a slot in the new project. Her current housing was substandard. She lived in a single room with her two daughters, sharing a bathroom and kitchen with other families in a rooming house. Her income

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<sup>5</sup> For the location of the Housing Authority's offices in 1951 see Polk's San Francisco City Directory, p. XXXX. I have distilled the facts of the Banks case from four groups of sources: the appellate court's opinion (Banks, 120 Cal.App. at 4-8); documents submitted to the trial court, the parties' appellate briefs, and contemporary newspaper articles. The following trial court documents can be found at the clerk's office of the San Francisco Superior Court, all as part of Docket # 420534: "Petition," "Points and Authorities," "Answer of Respondents," and "Statement by the Court." Other trial court documents can be found in the Papers of the NAACP, Region 1, Box 103, Folder 20 at the Bancroft Library, University of California Berkeley. These documents include: "Answer of Respondents, Housing Authority of the City and County of San Francisco. . . .," "Findings of Fact and Law," and "Judgment Granting Temporary Writ of Mandate." The available appellate court briefs are: "Brief for Respondents," Appellants' Closing Brief," "Appellants' Petition for a Rehearing," "Appellants' Petition for a Hearing by the Supreme Court," "Respondents' Answer to Appellants' Petition for a Rehearing." They can all be found as part of the civil docket number 15,693. Both Banks and the Housing Authority unsuccessfully petitioned the United States Supreme Court for a Writ of Certiorari. Their docket number is 583, October Term 1953. "Petition for Writ of Certiorari," and "Respondents' Brief in Answer to Petition for Writ of Certiorari." Newspaper articles: XXXXXXXX.

was insufficient to secure other housing in the private market. Furthermore, her husband, an active-duty fireman in the Navy, stationed overseas, was a veteran of the Second World War, thus entitling Banks to preferential access to federally-funded public housing projects such as North Beach Place. And she was second in line that day.<sup>6</sup>

Banks' application, however, was rejected. The Housing Authority refused to process it. Of the seven projects that the Authority managed, only one, Westside Courts, was open to African Americans. Indeed, under the Authority's neighborhood preference policy, only Italian American families were to occupy to the North Beach project, just as only Chinese American families had been admitted to the recently-constructed Ping Yuen apartments in Chinatown.<sup>7</sup> If there were spaces in Westside Courts, Banks would be considered for an apartment there. Similarly, several other projects that were under construction or in the planning stage would be open to black families. If she were willing to wait, Banks could apply to one of those projects.<sup>8</sup>

Banks, however, was not willing. Several months earlier, in May of 1952, the Western Regional Office of the NAACP had convened a meeting to formulate a legal strategy to attack segregated public housing in California.<sup>9</sup> Banks' decision to apply to the North Beach project seems to have stemmed from that meeting. While there is no direct evidence that the NAACP put Banks up to the task, the fact that Banks and the two other plaintiffs in the case, Tobbie Cain and James Charley, Jr., were NAACP members<sup>10</sup> and model candidates for public housing –

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<sup>6</sup> "Petition," p. 4.

<sup>7</sup> "Petition for Writ of Certiorari," p.3

<sup>8</sup> "Answers of Respondents," "Answer of Respondents, Housing Authority of the City and County of San Francisco. . . ."

<sup>9</sup> Brilliant, *The Color of America Has Changed*. p. 141.

<sup>10</sup> check this in Region 1 files.

married with young children, living in substandard housing, eligible for the veterans' preference -- suggests that their applications were designed to generate a test case. Regardless of her motive, by the fall of 1952, Banks had found her way to the law offices of Terry Francois, a young African American lawyer and member of the San Francisco NAACP's Legal Redress Committee. On September 3<sup>rd</sup>, Francois filed a complaint against the Housing Authority in Superior Court, demanding that Banks, Cain, and Charley be admitted to North Beach Place, and that the Authority end its segregation of public housing in the City, a policy, Francois argued, that was self-evidently unconstitutional.<sup>11</sup>

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By the time that Banks brought her case, the San Francisco Housing Authority had been segregating its public housing for more than a decade. As with many cities, San Francisco's public housing program began in 1937, with the passage of the United States Housing Act.<sup>12</sup> That legislation provided federal money to localities that wished to develop public housing for low income residents. While San Francisco immediately availed itself of the available federal money, it had a difficult time finding neighborhoods that wished to host low income housing projects. Consequently, the first three projects that were built at the end of the 1930s were in outlying neighborhoods: Bernal Heights, Potrero Hill, and Visitacion Valley. Because of their

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<sup>11</sup> "Petition," p. 5.

<sup>12</sup> For a history of New Deal housing policy and the United States Housing Act, see Gail Radford, *Modern Housing for America: Policy Struggles in the New Deal Era* (1997), pp. XX-XX; Gail Radford, "The Federal Government and Housing During the Great Depression," pp. 102-20 in John F. Bauman, Roger Biles, and Kristin M. Szlvian, eds., *From Tenements to Taylor Homes: In Search of an Urban Housing Policy in Twentieth-Century America* (2000); and "D. Bradford Hunt, "Was the 1937 U.S. Housing Act a Pyrrhic Victory?" 4 *J. of Planning History* 195 (2005).

out-of-the-way location, the Housing Authority was unable to fill them.<sup>13</sup> That only whites would be allowed to live in all three projects went without saying. Indeed, despite housing shortages and slum conditions in both Chinatown and the Western Addition (a predominantly Japanese neighborhood prior to the Second World War), the Housing Authority preferred to let 500 units sit vacant rather than allow Chinese or Japanese San Franciscans to occupy the empty apartments.<sup>14</sup>

Such empty units became a thing of the past with the coming of the Second World War. The War brought dramatic demographic changes to San Francisco, as war-related industries drew over 94,000 people to the City in less than three years.<sup>15</sup> Between 1940 and 1945, the City's population increased by over thirty percent.<sup>16</sup> African Americans made up a disproportionately large part of this growth. Fewer than 5000 African Americans lived in San Francisco in 1940. By the end of the War, the City's black population had topped 30,000, and by 1950 over 43,000 African Americans lived in the City, making them the largest non-white group in San Francisco.<sup>17</sup>

As both white and African American workers flowed into the City, a shortage of housing became a critical problem. This was particularly true with respect to African American workers. The vast majority of the new private housing built in the City to accommodate war workers was

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<sup>13</sup> Charlotte Brooks, *Alien Neighbors, Foreign Friends: Asian Americans, Housing, and the Transformation of Urban California*, (2009), pp. 94, 98.

<sup>14</sup> Brooks, *Alien Neighbors, Foreign Friends*, p. 107.

<sup>15</sup> Albert S. Broussard, *Black San Francisco: The Struggle for Racial Equality in the West, 1900-1954* (1993), p. 133

<sup>16</sup> *Id.*, p. 135

<sup>17</sup> *Id.*, pp. 133-35. According to the 1950 census, 43,502 African Americans lived in San Francisco, as compared to 24, 813 people identified as Chinese.  
<http://www.bayareacensus.ca.gov/counties/SanFranciscoCounty50.htm> (visited March 9, 2013).



subject to racially restrictive covenants that forbid its sale or rental to non-whites. Some lucky African American war workers obtained apartments in integrated, temporary wartime housing in Hunter's Point, but most black workers arriving from the south and southwest crammed into over-crowded, substandard housing in the Western Addition. Even after the forced removal of the Japanese American residents of this neighborhood, housing conditions for blacks were grim.<sup>18</sup>

The Housing Authority offered a token solution to this problem in 1942, when it constructed the Westside Courts, a 136 unit housing project in the middle of the Western Addition for use by the neighborhood's African American residents. With the building of this project, the Authority made explicit its policy of segregation. In May of 1942, it promulgated a "Resolution Declaring Policy of Selection of Tenants." The Authority insisted that it was committed to providing "accommodations for all citizens . . . without discrimination because of race. . . ."<sup>19</sup> It also claimed that it would provide such housing "for all races in the proportion which the number of low income families . . . in each racial group . . . bears to one another." However, when the Authority selected tenants for its properties, it would not mix the races:

In the selection of tenants for the projects of this Authority, the Authority shall act with reference to the established usages, customs and traditions of the community and with a view to the preservation of public peace and good order and shall not insofar as possible enforce the commingling of the races, but shall insofar as possible maintain and preserve the same racial composition which exists in the neighborhood where a project is located.<sup>20</sup>

The Authority's reference to "public peace and good order" revealed that its motive in establishing the policy was more than simply a desire to preserve white homeowners' property

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<sup>18</sup> Broussard, *Black San Francisco*, pp. 166-79; Brooks, *Alien Neighbors, Foreign Friends*, pp. 104-11.

<sup>19</sup> Housing Authority Resolution #287, attached to "Answer of Respondents, Housing Authority of the City and County of San Francisco. . . ."

<sup>20</sup> *Id.*

values. Across the country, World War II had stoked racial tensions, particularly in urban areas as blacks and whites were pressed into close proximity by the combination of housing shortages and wartime migration.<sup>21</sup> The construction of Westside Courts and the promulgation of the segregation policy were both attempts to be sure that these tensions did not burst forth into full scale civil unrest. Indeed, the completion of Westside Courts was stalled by objections of white residents on the western edge of the project until race riots over housing in Detroit forced the hands of Housing Authority officials.<sup>22</sup>

In the years following the Second World War, the Housing Authority's segregation policy – known as the “neighborhood pattern policy” -- became increasingly out of sync with San Francisco politics, as the City began its leftward trek towards a political culture that would produce the genuinely racially egalitarian politics of figures such as Philip Burton, Willie Brown, Harvey Milk, and George Moscone.<sup>23</sup> As early as 1943, Alice Griffith resigned her position as a Commissioner on the Authority rather than countenance the continued segregation of its properties.<sup>24</sup> In 1949, the Board of Supervisors demanded that the Housing Authority abandon the policy for all future projects, though ones that it was currently building – Ping Yuen and North Beach Place – were exempted from the prohibition. Ping Yuen would have Chinese residents only, and North Beach would be reserved for families of Italian ethnicity, but all subsequent projects should be open to all qualified San Franciscans, regardless of race. The

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<sup>21</sup> Thomas J. Sugrue, *Origins of the Urban Crisis*, pp. XX-XX. There were also race riots in Beaumont Texas, Los Angeles, and New York City in 1943. CITATION.

<sup>22</sup> Brooks, *Alien Neighbors, Foreign Friends*, p. 144.

<sup>23</sup> For the dramatic change in San Francisco's political culture in the decades following the Second World War, see Kevin Star, *Golden Dreams: California in an Age of Abundance, 1950-1963*, pp. 88-130; William Issel, *Church and State in the City: Catholics and Politics in Twentieth-Century San Francisco*, pp. XX-XX; and David Talbot, *Season of the Witch: Enchantment, Terror, and Deliverance in the City of Love*.

<sup>24</sup> Broussard, *Black San Francisco*, p. 177.

Authority resisted even this concession to postwar pluralism. Its obligation was to provide housing to the City's low-income residents, it declared. So long as it had projects for people of all races and ethnicities, it was not discriminating. By demanding the actual integration of public housing in the City, the Board of Supervisors was engaging in misguided social engineering: "An effort to change the character of a neighborhood," the Authority's executive director John Beard told the San Francisco Chronicle, "obviously would be accompanied by social disturbances of considerable degree."<sup>25</sup> In light of this resistance, few in San Francisco, least of all the NAACP, were surprised when the Authority offered an aggressive, full-throated defense of the neighborhood pattern policy when Banks challenged it in court.

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The Housing Authority's legal defense of the policy was managed by the San Francisco law firm of Roth and Bahrs. Almon Roth and George Bahrs were well-respected litigators in the City, with a practice primarily focused on management-side labor law.<sup>26</sup> Despite being labor lawyers, Roth and Bahrs were familiar with the legal issues related to racial discrimination. The firm served as the legal counsel for San Francisco Employers' Council, and in that capacity both lawyers had dealt extensively with civil rights issues in the late 1940s and early 1950s, spearheading the San Francisco business community's successful campaign against City fair employment practices legislation that civil rights activists had proposed at that time.<sup>27</sup>

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<sup>25</sup> "Segregation and S.F. Housing," Chronicle, p. 13 (January 15, 1950).

<sup>26</sup> Cite to Time Magazine piece on Roth.

<sup>27</sup> For the political battles over fair employment practices legislation in San Francisco, see Reuel Schiller, *Forging Rivals* (forthcoming); Broussard, *Black San Francisco*, pp. 211-20; Paul T. Miller, *The Postwar Struggle for*

Banks had eminent legal representation as well. The case was managed out of Francois' law office in the Western Addition, and Francois filed the initial complaint and the motions in the trial court. He also represented Banks and the other plaintiffs in the trial court, conducting a spirited cross-examination of Housing Authority officials.<sup>28</sup> Francois, however, was a young lawyer at the time, less than four years out of law school. Banks was his first major civil rights case.<sup>29</sup> Consequently, he sought out a more experienced co-counsel, Loren Miller.<sup>30</sup> Miller was one of the most experienced civil rights litigators in the state, and an expert in housing discrimination. By the time he took the *Banks* case, he had spent almost two decades successfully attacking racially restrictive covenants. In 1948 he was one of the NAACP lawyers who litigated *Shelley v. Kraemer*, the case in which the United States Supreme Court held that judicial enforcements of such covenants violated the Fourteen Amendment.<sup>31</sup> In light of this experience, Francois deferred to Miller's decisions about the strategy or the tactics of the litigation.<sup>32</sup>

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Civil Rights: African Americans in San Francisco, 1945-1975, pp. 29-39; Issel, Church and State in the City, pp. XX-XX.

<sup>28</sup> "Housing Authority Testifies," NAACP Papers, Western Regional Office, Box 103, Folder 20.

<sup>29</sup> Broussard, Black San Francisco, p. 223; Francois, "Autobiography," p. XX.

<sup>30</sup> Francois, "Autobiography," p. X. For biographical information about Miller, See Mack, Representing the Race, pp. 181-206; and Brilliant, The Color of America Has Changed, pp. 89-106.

<sup>31</sup> Brilliant, The Color of America has Changed, pp. 90-91. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>32</sup> Francois, "Autobiography."

The legal context in which Banks brought her claim was a rapidly changing one. The 1930s and 1940s had seen the rapid development of civil rights law.<sup>33</sup> Both the NAACP and the Communist-affiliated International Labor Defense spent these decades litigating cases that sought to revive the promise of the Fourteenth Amendment as the constitutional basis for requiring state governments to act in a racially egalitarian manner. These cases included several in which the litigants attacked state and local governmental attempts to promote residential segregation. In 1917 the United States Supreme Court held unconstitutional a local ordinance that forbid African Americans from occupying property on a block that was majority-white (and vice versa).<sup>34</sup> While this case, *Buchanan v. Warley*, was based on a defense of property rights more resonant with substantive due process jurisprudence than with principles of racial egalitarianism, civil rights litigators found it to be an extremely congenial precedent, using to successfully attack similar ordinances and racially restrictive zoning plans during the 1920s and 1930s.<sup>35</sup> Similarly, in *Shelley*, Miller had successfully attacked racially restrictive covenants that forbid homeowners from selling their property to racial or religious minorities.<sup>36</sup>

The judiciary's record with respect to public housing was less clear. Government provision of housing was a relatively new phenomenon in 1950, and, consequently, there were

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<sup>33</sup> For overview of the development of civil rights law in twentieth-century America see Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*; Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*; Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education*; Genna RaeMcNeill, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights*.

<sup>34</sup> *Buchanan v. Warley*, 245 U.S. 60 (1917). For a fascinating, detailed description of the litigation leading to the Supreme Court's decision see Patricia Hagler Minter, "Race, Property, and Negotiated Space in the American South," in Sally E. Hadden and Patricia Hagler Minter, eds., *Signposts: New Directions in Southern Legal History* (2013).

<sup>35</sup> Klarman, *From Jim Crow to Civil Rights*, pp. 90-93, 142-146. ANOTHER CITE?

<sup>36</sup> For Loren Miller's involvement in *Shelley*, see Mack, *Representing the Race*, pp. 203-204; Brilliant, *The Color of America Has Change*, pp. 101-05.

few civil rights cases involving it. In the cases that did exist, lower federal and state courts were split on whether neighborhood pattern policies violated the Fourteenth Amendment, and no case on the subject had been decided by the United States Supreme Court or the highest court of any state.<sup>37</sup> At the same time, the Supreme Court had refused to review a New York Court of Appeals case that rejected a challenge to the state's decision to give tax breaks and eminent domain powers to a private developer that excluded racial minorities from its properties.<sup>38</sup> Similarly, courts refused to prohibit the federal government from funding public housing projects that were racially segregated.<sup>39</sup>

While the courts' reaction to residential segregation was thus mixed, the case law regarding other forms of segregation was less ambivalent. The NAACP's litigation campaign attacking inequality in higher education and interstate transportation had been exceptionally successful. In the 1930s and 1940s, Supreme Court cases had required railroads and public graduate and professional schools to provide equal accommodations to blacks and whites.<sup>40</sup> Thus, the NAACP's strategy of requiring actual equality under *Plessy v. Ferguson*'s doctrine of "separate but equal" was bearing fruit. Indeed, in *Sweatt v. Painter* and *McLaurin v. Oklahoma* (both decided less than a year before Banks brought her case), the Court had held that, under most circumstances, segregated graduate and professional education could never provide equal

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<sup>37</sup> *Seawell v. MacWithy*, 2 N.J. Super. 255, rev'd 2 N.J. 563 (1949); *Favors v. Randall*, 40 F. Supp. 742 (E.D. Penn. 1941). CITE STANFORD ARTICLE AS WELL.

<sup>38</sup> *Dorsey v. Stuyvesant Town*, 299 N.Y. 512, 531, 535 (1949), cert. denied, 339 U.S. 981 (1950).

<sup>39</sup> Klarman, *From Jim Crow to Civil Rights*, p. 263

<sup>40</sup> See, *Mitchell v. United States*, 313 U.S. 80 (1941); *Henderson v. United States*, 339 U.S. 816 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma*, 339 U.S. 637 (1950).

experiences and opportunities for African American students. Accordingly, the Court required actual integration, though in both cases the Court explicitly declined to overrule *Plessy*.<sup>41</sup>

In the months after *Sweatt* and *McLaurin* were decided, the NAACP abandoned its strategy of making states live up to the requirements of *Plessy*, and chose to attack segregation directly. It also decided that racial attitudes had changed enough in the United States to permit it to shift its focus on educational segregation from cases that had become relatively uncontroversial – graduate school segregation – to cases that were bound to be more actively resisted – segregation in elementary and secondary schools.<sup>42</sup> Thus, in the spring of 1951, the NAACP commenced the first of the five lawsuits that would be consolidated into *Brown v. Board of Education*.<sup>43</sup> Just months after Francois filed Mattie Banks’ case in California, *Brown* was argued before the Supreme Court. Had Loren Miller been privy to the Justices’ conference, he might have hesitated to push so hard to overturn *Plessy*. After the initial oral arguments, it seemed unlikely that the Supreme Court would go so far.<sup>44</sup> Banks’ case was thus brought at a moment when the law was both transitional and unstable. The NAACP had committed itself to a direct attack on segregation that some within the organization thought was premature.<sup>45</sup> Whether the equal protection clause would be read to ban segregation was as yet unclear, and the willingness of courts to interfere with public housing policies was similarly unproven.

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<sup>41</sup> *Sweatt*, 339 U.S. at 634-36; *McLaurin*, 339 U.S. at 642.

<sup>42</sup> Klarman, *From Jim Crow to Civil Rights*, pp. XX-XX; Tushnet, *The NAACP’s Legal Strategy Against Segregated Education*, pp. XX-XX.

<sup>43</sup> Klarman, p. 290.

<sup>44</sup> Klarman, p. 292-302; Kluger, p. XX.

<sup>45</sup> Klarman, p. 292; Tushnet, p. XX.

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In their attack on the neighborhood pattern policy, Banks' attorneys made a variety of arguments before both the trial court and the court of appeals that challenged the policy from slightly different angles. Most notable, however, was the argument that they did not make. Miller and his colleagues explicitly refused to attack the neighborhood pattern policy as a violation of the principle of separate but equal, even though the facts of the case strongly suggested that such an approach would have been a winning one. Instead, consistent with the National Office's recent switch to attacking separate but equal head on, the NAACP attorneys made a series of arguments aimed at undermining *Plessy*.

At the trial level, the plaintiffs argued that racial classifications were prohibited by the United States Constitution, the California Constitution, and by state public policy.<sup>46</sup> This assertion was followed by a laundry list of federal and state cases that stood for a variety of principles. Some were federal and California constitutional cases that mandated colorblind application of state and local laws (*Yick Wo v. Hopkins*, *Hill v. Texas*, *Oyama v. California*, *Perez v. Sharpe*). Others were cases that followed *Plessy*, holding unconstitutional unequal accommodations, (*Sipuel v. Board of Regents*, *McCabe v. Atchison*, *Topeka, and Santa Fe Railway*). One case, the infamous Japanese internment case *Korematsu v. United States*, upheld a facially discriminatory law, but declared that such laws should be subject to heightened scrutiny by courts.

Perhaps realizing the doctrinal basis for this broad attack on *Plessy* was not fully formed, the plaintiffs also argued, both at the trial court and on appeal, that housing discrimination should

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<sup>46</sup> "Points and Authorities," pp. 1-3.



be treated as a special category in which *Plessy* did not apply.<sup>47</sup> Here they had a stronger case. After all, in *Buchanan v. Warley*, decided forty-five years earlier, the Supreme Court had held that states could not pass laws requiring residential segregation. Similarly, the Court had just held, in *Shelley*, that the 14<sup>th</sup> Amendment prohibited courts from enforcing restrictive covenants that forbid the sale of property to people of a specific race. Banks' case, Miller argued, was equivalent to those two. If *Buchanan* forbade the legislature from requiring housing discrimination, and *Shelley* forbade the judiciary from participating in it, why should an executive agency be allowed to discriminate in the way it allocated public housing? The *Banks* case should complete the trilogy, declaring that no branch of government could be complicit in the creation residential segregation.

Finally, the plaintiffs made their most conservative argument: even if the neighborhood pattern policy did not violate the state or federal constitution, it violated California public policy.<sup>48</sup> Civil rights litigators had successfully made this argument during World War II to require labor unions in the defense industry to admit African American members.<sup>49</sup> An administrative agency could not behave in a fashion that, while not explicitly prohibited by statute, violated a broad public policy made evident by legislative or judicial action. By the early 1950s, Miller and his colleagues could point to all sorts of state action aimed at eliminating unequal treatment of the races. In addition to desegregating labor unions, California courts had required the desegregation of swimming pools and, to a lesser extent, public schools. The California legislature had formally abolished the statutory requirement of school segregation the

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<sup>47</sup> "Points and Authorities," p. 2; "Brief for Respondents," pp. 2-9; "Respondents' Answer to Appellants' Petition for Rehearing," pp. 8-14; "Petitioners' Brief in Answer to Petition for Writ of Certiorari," pp. 5-7.

<sup>48</sup> "Points and Authorities," p. 3; "Brief for Respondents," pp. 9-17.

<sup>49</sup> Cite to *James v. Marinship*.

year before the *Banks* case was brought, and had passed civil rights laws prohibiting discrimination in public accommodations, public works projects, and the state's national guard. Thus, even if the federal constitution were to continue to require application of the *Plessy*, "the fact is plain that California does not follow the 'Separate But Equal' rule."<sup>50</sup>

As far as the Housing Authority was concerned, this claim, like all of Banks' arguments, was nonsense.<sup>51</sup> Simply pointing out that the state had banned certain types of racial segregation was not enough to indicate that it was the state's public policy to ban all types of segregation. Indeed, the state's piecemeal prohibitions on segregation and racial discrimination seemed to indicate the opposite. If the state really espoused a "*blanket policy* against *any* and *all* forms of segregation", why had the state legislature explicitly refused to enact fair employment practices legislation or fair housing legislation?<sup>52</sup> Indeed, the labor union cases and the public school cases stood not for the premise that segregation was against California's public policy, but that unequal treatment of the races was forbidden. If the state had a blanket public policy with respect to racial discrimination, it was that separate but equal was allowed, unless the legislature passed a law that indicated otherwise.

Of course, this rejection of the public policy claim was not at the center of the Housing Authority's argument. The Authority's main argument was quite simple: The Supreme Court had not overruled *Plessy*.<sup>53</sup> Indeed the Court had explicitly declined to do so a year and a half earlier in *Sweat v. Painter*. Therefore, separate but equal was still good law. Accordingly, the

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<sup>50</sup> "Brief for Respondents," p. 14.

<sup>51</sup> "Appellants' Closing Brief," pp. 4-8.

<sup>52</sup> "Id.," p. 4.

<sup>53</sup> "Appellants' Closing Brief," pp. 3-4; "Appellants' Petition for a Hearing by the Supreme Court," pp. 18-30; "Petition for Writ of Certiorari," pp. 7-12.

only question raised in the case was whether African Americans were being provided with equal accommodations. The Housing Authority vigorously asserted that they were. It described, in great detail, the existing public housing in the City, as well as the new units that would be created in the near future. Of these units, 4095 would be occupied by white families, and 1761 would be occupied by non-white families – 70% white, 30% non-white. At the same time, the Housing Authority submitted evidence that the need for low-income public housing was distributed in the same way. Of the 23,000 families that currently lived in substandard housing, 70% were white, 30% were non-white.<sup>54</sup>

As far as the Housing Authority was concerned, these statistics should have ended the inquiry. Allocating public housing in proportion to the racial make-up of the City's population was the only way to fairly distribute a limited resource. Indeed, it was Banks' insistence on race-blind admission to public housing that was likely to create inequities:

This court can take judicial notice of the fact that there are cultural and social groups within this city which are most clearly defined by nationality and race. We have German, Italian, Latin, Negro, and Chinese settlements. How unfair it would be to prefer one over the other! Yet [the Housing Authority] is condemned for adopting a policy which would prevent the possibility of such a preference.<sup>55</sup>

All the Housing Authority was trying to do was “make a reasonable distinction based on the justice of the demands of all groups.”<sup>56</sup>

The Authority's emphasis on the “reasonableness” of its policy rather than simply on the equality of the facilities indicated the extent to which its attorneys realized that *Plessy's* formulaic approach to segregation was waning. Consequently, the Authority was willing to give

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<sup>54</sup>“Answer of the Respondents, Housing Authority of the City and County of San Francisco, pp.2-4; “Appellants’ Closing Brief,” p. 2; “Petition for a Hearing by the Supreme Court,” pp. 2-5; Banks, 120 Cal.App. at 5-8.

<sup>55</sup> “Brief for Rehearing,” p. 4.

<sup>56</sup> *Id.*, p. 5

a full-throated defense of the neighborhood pattern policy. Gone were any references to the original goal of the policy – to prevent racial conflict. Instead, the Housing Authority espoused a new rationale behind the policy that combined civic boosterism with a heavy dose of the cultural pluralism that was increasingly common in postwar political culture. The Authority’s neighborhood pattern policy would not only ensure that scarce public housing resources were allocated equitably among the City’s racial and ethnic groups. It would also preserve San Francisco’s unique civic character. The Authority “had a right to consider the social fact that the city is known throughout the world for its international flavor, [and] that much of the city’s charm and renown depend in large measure upon its exciting and interesting nationality and neighborhood groups, such as Chinatown and North Beach.”<sup>57</sup> The neighborhood pattern policy was thus needed to draw tourism to the City. It was also desired by the minority groups themselves. “[T]he petitioners were at liberty to act with reference to the established usages, customs and traditions of the people in preferring the neighborhood pattern. The interests of these other groups in maintaining their homogeneity, not merely for social but for economic purposes, has been entirely neglected by the Court. . . .”<sup>58</sup>

Having thus attacked Banks’ claim by asserting its right to reasonably segregate (for lack of a better term) its public housing, the Housing authority turned its attention to the argument that even if *Plessy* were good law, it did not apply in the field of housing. This may have been Banks’ strongest argument. After all, in *Buchanan v. Warley*, the Supreme Court had rejected just the sort of reasonableness argument that the Authority proffered in this case.<sup>59</sup> Similarly, the

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<sup>57</sup> Id., pp. 6-7.

<sup>58</sup> Id. p. 7.

<sup>59</sup> *Buchanan*, 245 U.S at 73-74, 80-82.

non-discrimination principle in property transactions had been recently and forcefully upheld in *Shelley v. Kraemer*. Not surprisingly then, the Authority's attack on this line of cases aimed at the one significant distinguishing fact between those cases and the one at hand: *Buchanan, Shelley*, and their progeny involved a transaction between two parties, both of whom were willing to consummate the transaction.<sup>60</sup> Thus, in those cases, the government was interfering with the property and contract rights of both parties. In this case, on the other hand, one of the parties did not wish to participate in the transaction. Surely there was no principle of property law or contract law that would require a party to enter into a lease with any particular person. Only if the government's reason for not wishing to enter the lease was unreasonable would the refusal be problematic, and, as the Housing Authority repeatedly asserted, its reasons for doing so in this case were unimpeachable.

The Housing Authority also argued that the distinction between public housing and the regulation of private housing transactions was a constitutionally relevant one because of the rights/privileges distinction.<sup>61</sup> In the early 1950s, when the *Banks* case was brought, the idea that constitutional protections did not attach to government actions that impacted benefits given out by the government ("privileges") was widespread.<sup>62</sup> Because the Housing Authority did not have to provide public housing, it could impose whatever conditions on the privilege of public housing that it wished to. "This distinction between property rights and privileges is important.

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<sup>60</sup> Appellant's Closing Brief, p. 3; Appellants' Petition for a Rehearing, pp. 7-8; Petition for Writ of Certiorari, pp. 12-14.

<sup>61</sup> Appellants' Brief for Rehearing, pp. 7-8; Petition for Writ of Certiorari, pp. 12-14.

<sup>62</sup> Oliver Wendell Holmes, Jr., articulated this "rights/privileges distinction" most forcefully as a member of the Supreme Judicial Court of Massachusetts in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216 (1892), and *Davis v. Commonwealth*, 162 Mass. 510 (1895). The distinction was reaffirmed a year before *Banks* brought her case in *Bailey v. Richardson*, 182 F.2 46, 59 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). William W. Van Alstyne has recounted the various ways courts circumvented the doctrine prior to its abolition in the early 1960s. "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv L.Rev. 1439 (1968).

The Court is well aware that there have been many instances of the federal government attaching otherwise unconstitutional conditions to privileges extended by it to individuals and [sic] which have been upheld against constitutional attack.”<sup>63</sup> Indeed, the Housing Authority did not even believe that such an extreme reading of the rights/privileges distinction was necessary to defend the neighborhood pattern policy. As with its discussion of *Buchanan* and *Shelley*, the Authority simply asserted that governmental distribution of privileges had to be reasonable, a standard that its proportional distribution of housing clearly met.<sup>64</sup>

Because each of the Authority’s arguments ultimately came back to the reasonableness of its decision to allocate public housing on such a basis, Banks’ lawyers focused their rebuttal on this particular point. The right to equal protection afforded by the Fourteenth Amendment, Banks argued, was an individual right, not a group right. Thus, simply arguing that African Americans as a group would be given a proportional amount of public housing did not satisfy equal protection doctrines. Public housing was a finite resource. Thus, once the housing designated for African Americans was full, the black individual who applied for housing would be rejected even if space was available in other housing projects. This person was being rejected because of their race, in violation of their individual right to be free from discrimination.<sup>65</sup>

Banks supported this argument by citing a series of cases involving discrimination by interstate railroad carriers.<sup>66</sup> In two of these cases, *McCabe v. Atchison, Topeka and Santa Fe Railway* and *Mitchell v United States*, the United States Supreme Court held that railroad

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<sup>63</sup> Brief for rehearing, p. 8.

<sup>64</sup> *Id.*, pp. 7-8.

<sup>65</sup> Banks appellate brief, pp. 7-9; Banks supreme ct brief, pp. 5-8; Banks cert. petition, pp. 5-9.

<sup>66</sup> Banks Appellate brief for the respondent, p. 8; Banks closing brief, p. 3; Banks Answer to supreme ct petition, pp. 5-8; Banks cert. petition, pp. 7-8.

companies violated the equal protection clause or the Interstate Commerce Act when they failed to provide first class facilities for African American passengers.<sup>67</sup> In each instance the railroads had argued that the decision not to offer such facilities was driven not by racial animus but by the negligible demand for first-class accommodations by black riders. The third of these cases, *Henderson v. United States*, was more directly analogous to the public housing situation.<sup>68</sup> In that case, decided a year and a half before Banks' lawsuit, an African American was refused service in the dining car of a train because the "Negro section" of the dining car was full. The Court held that this refusal violated the Interstate Commerce Act's prohibition on "unreasonable discriminations." The Court explicitly rejected the railroad's argument that proportional allocation of a limited resource satisfied the anti-discrimination requirements of the Act:

But it is no answer to the particular passenger who is denied service at an unoccupied place in the dining car that, on the average, persons like him are served. As was pointed out in *Mitchell v. United States*. . . "the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act." . . . That the regulations may impose on white passengers, in proportion to their numbers, disadvantages similar to those imposed on Negro passengers is not an answer to the requirements of [the Interstate Commerce Act]. Discriminations that operate to the disadvantage of two groups are not the less to be condemned because their impact is broader.<sup>69</sup>

This was a powerful precedent for Banks:

There is no distinction whatever between what was attempted to be done in the Henderson case and what Appellants seek to do here. Here, as there, there are statistical surveys made to shed an aura of fairness over the procedure. Here, as there, the right of the individual is equated to that of his ethnic group.<sup>70</sup>

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<sup>67</sup> McCabe, 235 U.S. 151 (19XX); *Mitchell v. United States*, 313 U.S. 80 (19XX).

<sup>68</sup> *Henderson*, 339 U.S. 816 (1950).

<sup>69</sup> *Henderson v. United States*, 339 U.S. 816, XXX (1950)

<sup>70</sup> Banks' supreme court brief, p. 7.

The Housing Authority begged to differ. There were in fact relevant differences between the railroad cases and the case at hand. First of all, in three cases the actual treatment of black riders and white riders was unequal, violating *Plessy*. In *McCabe* and *Mitchell*, the railroads were attempting justify having no first class facilities for African Americans at all, a position clearly contrary to principle of separate but equal.<sup>71</sup> In *Henderson*, the tables that were set aside for African Americans could be used by white passengers if black riders were not using them, but the reverse was not true. While whites could use unoccupied seats in the black portion of the dining car if there were no seats available in the white section, under no circumstances were African Americans allowed to sit in the portion reserved for whites. Indeed, Mr. Henderson was refused service in the dining car because white riders were eating in the black section of the car. Thus, like *McCabe* and *Mitchell*, *Henderson* could be read narrowly, as nothing more than a condemnation of separate and *unequal* treatment.

Even more problematic for Banks was the fact that *Henderson* – clearly the plaintiffs’ best precedent – was not a constitutional decision at all. The Court explicitly avoided the constitutional issue, basing its decision entirely on the Interstate Commerce Act. The Housing Authority never questioned the ability of the state or federal government to abolish the separate but equal requirement, or to prohibit what it considered to be a perfectly reasonable allocation of public housing among racial and ethnic groups. It argued, however, that the state of California had never done so with respect to public housing, and that the Supreme Court had never interpreted the Fourteenth Amendment to do either of these things.<sup>72</sup>

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<sup>71</sup> HA Supreme court brief, pp. 35, 42.HA cert. petition, pp. 8-10.

<sup>72</sup> HA Closing brief, p. 3.



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On October 1, 1952, Melvyn Cronin, the judge presiding over the *Banks* case, issued a brief memorandum declaring the legal principles under which he planned to decide the case. Cronin declined to embrace Banks' most far reaching claim – that separate but equal was no longer recognized as a valid legal doctrine by either the federal government or the state of California, though he noted that racial classifications were “viewed with suspicion” within the state.<sup>73</sup> Instead, he picked up on the argument that *Plessy* did not apply in the context of property law. Separate but equal, he reasoned, “has in later years lost its force by reason of the holdings of many other cases showing that it has no application to the ownership or occupancy of real property.”<sup>74</sup> Here, Cronin cited *Shelley* and *Buchanan*. He recognized, as he had to, that other courts had interpreted these cases differently, but he held that his reading of the cases was “a sounder, fairer, more enlightened and advanced principle to guide us in the matter of public housing, in granting the negro what he is entitled to as a citizen – genuine equality of treatment under the law.”<sup>75</sup>

Cronin's legal decision was hardly the end of the case. The Housing Authority was determined to maintain its policy. Consequently, it spent the next month attempting to render the case moot by arguing that both Maddie Banks and James Charley, Jr. were ineligible for public housing regardless of their race. Banks, it claimed, had falsified her income on her application,

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<sup>73</sup> Statement by court, p. 2.

<sup>74</sup> Statement by the Court, p. 1.

<sup>75</sup> *Id.*, p.2.

and Charley was a convicted criminal.<sup>76</sup> Cronin rejected these claims, and in the middle of November ordered both plaintiffs admitted to public housing units, but stayed his order pending the Housing Authority's appeal of the case.<sup>77</sup>

The parties argued the appeal before a three judge panel of the District Court of Appeals the following spring, and that court issued its opinion, upholding the trial court, in August.<sup>78</sup> The Court of Appeals opinion gave Banks almost everything she wanted. Justice Fred B. Wood started his opinion by rejecting the Housing Authority's claims that it was providing equal treatment of the races, even on its own terms. The Authority stated that its current construction plans would yield 1756 apartments for non-white families, enough to render 30% of the City's public housing stock available to people of color. Yet at the time that the appeal was heard, the Housing Authority had built 2016 units, of which only 310 were available to non-whites. Thus, even if one accepted the Authority's legal theory -- that all the Fourteenth Amendment required was proportional availability of the public resource -- it had failed to meet that standard. Only 15% of public housing was set aside for non-whites.<sup>79</sup>

Having demonstrated that the Housing Authority could not meet the constitutional standard even under its own reading of the Constitution, Justice Wood then rejected its legal theory. Wood adopted, whole cloth, Banks' claim that the Fourteenth Amendment required each individual to be considered for a public benefit in a race-neutral fashion. The individual right

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<sup>76</sup> "Housing Chief Testifies 2 Suing Are Ineligible," San Francisco Examiner [?], (October 7, 1952), p. X; "Court Hearing Opens on Negroes Housing Charge," San Francisco Chronicle (October 7, 1952), p. X; "One Suing for Housing Described as Ex-Burglar," San Francisco Examiners (October 8, 1952), p. 10.

<sup>77</sup> San Francisco Superior Court, "Findings of Fact and Conclusions of Law," Banks v. Housing Authority, Docket # 420534, November 7, 1952, in NAACP Region One Papers, Box 103, Folder 20;

<sup>78</sup> Banks v. Housing Authority, 120 Cal. App.2d 1 (1953).

<sup>79</sup> Id. at 9

created by the Amendment could not be satisfied by simply providing public resources in proportion to each racial group's presence in the population. Wood's doctrinal support for this principle was not entirely clear. On the one hand he cited the railroad cases that Banks had focused on – *McCabe, Mitchell, and Henderson*.<sup>80</sup> On the other hand, he quoted extensively from a series of United States Supreme Court opinions requiring the admission of African American students to previously segregated institutions of high education – *Missouri ex rel. Gaines v. Canada, Sweatt v. Painter, and McLaurin v. Oklahoma State Regents* – that were based on the fact that each state was unable to provide equal educational resources to black students.<sup>81</sup> The former group stood for the proposition that Banks had argued for: the proportional allocation of public goods did not satisfy the separate but equal doctrine. By contrast, the latter cases stated that while separate but equal was still a valid constitutional doctrine, in the context of higher education, it was sometimes impossible to achieve equality with separate institutions.

Wood then turned his attention to the real property cases – *Buchanan, Shelley* and their progeny. His reading of these cases was, if anything, more radical than Banks'. He rejected the idea that government could attach unconstitutional conditions to a public benefit. He also noted that by unconstitutionally enforcing racially restrictive covenants for decades, the state had created the segregated "neighborhood pattern" that it was trying to perpetuate with the Housing Authority's policy.<sup>82</sup> If courts and legislatures were forbidden from promoting residential segregation, then there was no basis for excluding executive action from the same prohibition. "What sort of 14<sup>th</sup> Amendment might it be that would . . . countenance active sponsorship and

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<sup>80</sup> Id. at 10-11, 13.

<sup>81</sup> Id. at 12-13.

<sup>82</sup> Id. at 18.

fostering of such restrictions by the executive branch of the state or local government?”<sup>83</sup>

Indeed, the court’s reading of the 14<sup>th</sup> Amendment was so robust that the court did not feel the need to address any of the policy rationales that the Authority raised. Whether the court considered these rationales to be pretexts or whether it believed it was not supposed to inquire into them was left unclear by the decision. What was clear, however, was that the neighborhood pattern policy was to be consigned to the dustbin of history.

The Housing Authority, however, was not prepared to surrender. It appealed to the California Supreme Court with no luck – the Court affirmed the lower court’s decision without holding oral arguments or issuing an opinion.<sup>84</sup> It then asked the United States Supreme Court to hear the case. Indeed, both the Housing Authority and Banks hoped to get the case before the high court. The former argued that the California courts each erred by declaring state-sponsored racial separation to be per se unconstitutional. It requested that the Court reaffirm *Plessy*’s separate but equal doctrine, or at least require the state courts to explain why the Authority’s reasons for the policy were unreasonable.<sup>85</sup> Banks, on the other hand, asked the Court to repudiate *Plessy* altogether. The NAACP saw the *Banks* case as a perfect adjunct to *Brown*, which was currently before the Court. It was an opportunity to get the Court to hold that segregation was impermissible not only in the educational context, but in housing as well.<sup>86</sup>

The Court, however, was not willing to accommodate either of the litigants, denying both certiorari petitions a week after it decided *Brown*.<sup>87</sup> Nonetheless, San Francisco’s civil rights

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<sup>83</sup> Id.

<sup>84</sup> Citation.

<sup>85</sup> HA certiorari brief, pp. 7-14.

<sup>86</sup> Banks certiorari brief, pp. 4-9.

<sup>87</sup> 347 U.S. 974 (1954).

community considered the ultimate outcome a triumph. After the trial court's decision, the City's African American newspaper, the *Sun Reporter*, announced that "Cronin Kills Dixie Housing Pattern."<sup>88</sup> When the Court of Appeals upheld Cronin, the paper proclaimed the Authority's "Race Policy Voided" in its largest type-face, placed above the paper's name on the front page.<sup>89</sup> The court had handed the Housing Authority a "well-deserved rebuke" to its "fanatical and futile efforts to maintain a prejudicial and undemocratic policy."<sup>90</sup>

One fly in the ointment, however, remained unacknowledged by the editors of the *Sun Reporter*. At the beginning of Appellate Court's opinion, Justice Wood made an observation that was missing from the NAACP's discussion of public housing in San Francisco. Only 15% of the Housing Authority's current properties were designated for non-white families, he noted. Yet, because of San Francisco's particularly diverse population, even this percentage understated the public housing available to African Americans. "[W]ithin the non-white group, the dwelling units are unequally allotted: 174 to Chinese and 139 to Negroes; i.e. 56% Chinese and 44% Negro, whereas there is evidence that the 6,899 eligible non-white families are 'substantially' Negro."<sup>91</sup> As these figures indicated, San Francisco's Chinese population had had more success in convincing the City to address its housing problems than had its African American population. It also suggested that the Housing Authority's fears of inter-racial conflict over scarce public housing resources was more than simply a pretextual argument designed to justify continued housing segregation. Banks had created a constitutional right to integrated public housing. As it turned out, many within Chinatown believed that such a right would undermine a successful,

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<sup>88</sup> *Sun Reporter*, October 11, 1952, p. 8.

<sup>89</sup> *Sun Reporter*, September 5, 1952, p. 1.

<sup>90</sup> *Sun Reporter* Septmber 5, 1953, p. 8.

<sup>91</sup> Banks, 120 cal. APP.2d 1, 9 (1953).

decade-long struggle to get the City to recognize the housing needs of its Chinese American residents.

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In the December of 1951, several months before Maddie Banks commenced her lawsuit, the San Francisco Housing Authority opened the three-building Ping Yuen housing project in the north-west corner of Chinatown.<sup>92</sup> Ping Yuen (which the Authority translated as “Tranquil Gardens”) was to house 234 Chinese American families in modern, two, three, and four bedroom apartments. Though the buildings were substantially taller than the low shops and tenements that dominated Chinatown, they were designed to fit in with the neighborhood’s racial and cultural profile. “Strikingly Chinese in architectural motif and color scheme,” was how the Authority proudly described the buildings. In addition to the red, gold and green paint job and the lions adorning the pediments, the entrance to the buildings was “a reproduction of the Pailou Gate . . . copied from that of the Marble Pagoda in front of the Yellow Monastery in Peking.” As for the inscription over the gate, who else could the Authority choose but Lao Tse: “Peace and Prosperity Prevail Among Virtuous Neighbors.”<sup>93</sup> These Chinese motifs fit perfectly with Chinatown’s intense, decades-long effort to transform its image from that of a disease-ridden slum of opium dens and whorehouses into an exotic, but safe tourist attraction that added to San

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<sup>92</sup> For descriptions of Ping Yuen, and of the politics surrounding its construction see Victor Nee and Brett de Barry Nee, *Longtime Californ’: A Documentary Study of an American Chinatown* (New York: Pantheon, 1972), pp. 320-24; Shah, *Contagious Divides*, pp. 239-45; Brooks, *Alien Neighbors, Foreign Friends*, pp. 139-40, 155-58, 188-93, 224-27; and Scott H. Tang, “Becoming the New Objects of Racial Scorn: Racial Politics and Racial Hierarchy in Postwar San Francisco, 1945-1960,” in Jeff Roche, ed., *The Political Culture of the New West* (Lawrence, Ka.: University of Kansas Press, 2008), pp. 236-240.

<sup>93</sup> Housing Authority Annual report, 1951, p. 1.

Francisco's cosmopolitan appeal. Indeed, the Housing Authority had no doubt that the buildings had "become an added source of tourist interest to visitors to Chinatown."<sup>94</sup>

The project's "characteristic oriental architecture" sent another message as well: Ping Yuen belonged to the Chinese.<sup>95</sup> Indeed, the Housing Authority delegated the job of selecting the project's tenants to a committee of community leaders from Chinatown.<sup>96</sup> For San Francisco's Chinese American community, the opening of Ping Yuen thus represented the transformation of its status in the City from oppressed, despised outsiders to a respected, politically powerful interest group.<sup>97</sup> This transformation was driven, in large part, by the politics of World War II and the Cold War. Prior to the Second World War, the Chinese were by far San Francisco's largest minority community. Traditionally, it was also the most reviled. Hemmed into Chinatown's crowded, substandard housing, San Francisco's Chinese population faced discrimination in employment, housing, and public accommodations, hostility from police and public health officials, and violence from bigoted demagogues who stoked white working class fears about competition for jobs. By the end of the Second World War, both the image and the fortunes of the Chinese American community had changed. The Chinese had been loyal allies during the War – heroic resisters of Japanese aggression. After the War, many of those living in the United States were staunch supporters of the Kuomintang and thus stood at the forefront of the anti-communist struggle against "Red" China. This preferred status led to a dramatic decline in anti-Chinese sentiment. It also resulted in tangible benefits for the Chinese American community in the United States, such as a loosening of restrictions on Chinese

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<sup>94</sup> Housing Authority Annual Report, 1952, p.2.

<sup>95</sup> Id.

<sup>96</sup> Brooks, Shah, p. 240.

<sup>97</sup> Cite to Shah, p. 240, 242; Tang, and Brooks, p. 191-93.

immigration, political appointments for Chinese Americans, and the provision of government benefits to the Chinese American community. Ping Yuen was one such benefit.

As historian Charlotte Brooks has explained, this preferred place within the geopolitical landscape had a profound effect on racial dynamics in the postwar period.<sup>98</sup> The wartime experiences of Japanese Americans and African Americans (such as internment and segregation in the military) placed them in opposition to the government. This was a relationship that continued after the War. Chinese Americans, on the other hand, did not have to contend with such policies. Instead, they were able to form alliances with the state and derive substantial benefits from that alliance. Strong American support for Chinese Nationalist forces guaranteed that this close relationship continued after the War had ended.

In light of this dynamic, it is not surprising that San Francisco's Chinese community had a different reaction to the *Banks* lawsuit than did the City's African American population. Interracial civil rights groups such as the Council for Civic Unity (CCU) had already tussled with Chinese American leaders over the very premise of creating a housing project "for" Chinatown. At the time of Ping Yuen's gala opening, the CCU's president Godfrey Lehman condemned the project in no uncertain terms. The message sent by Ping Yuen's aesthetic orientalism (to say nothing of its Chinese American selection committee) was clear. The "project is for Chinese only. Negroes, whites, and even other people of oriental descent – go live in your own projects."<sup>99</sup> When the CCU suggested that genuine integration of all of San Francisco's public housing would make more housing available to the Chinese community than would a single

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<sup>98</sup> Brooks, p. 156.

<sup>99</sup> Lehman quoted in Shah, p. 241.



complex in Chinatown, Chinese American leaders' response was unenthusiastic.<sup>100</sup> The community had succeeded in getting some housing through a strategy of racial entitlement – they had earned the housing with their loyalty during World War II, their anti-communism, and their willingness to assimilate. The alternative approach – the hope that a seemingly quixotic, inchoate plan to make public housing available city-wide would eventually lead to more housing opportunities – seemed unnecessarily risky. Why give up slots for Chinese Americans in Ping Yuen for the hope that those families could move in elsewhere? A bird in the hand was worth two in the bush.

The CCU's suggestion also betrayed an ignorance of the specific desires of the Chinese American community in San Francisco, or at least an inclination to put lofty, pluralist goals above more practical considerations. Because of employment discrimination in the City, the vast majority of Chinatown's residents worked within the community. Similarly, a large percentage of the neighborhood's residents spoke little or no English. Thus, offering Chinatown's population access to San Francisco's other public housing projects, some as far away as Visitacion Valley, was not a particularly appealing suggestion. Nor was the idea of moving non-Chinese people into the neighborhood dependent on "perceptions of its 'Chineseness' for economic survival" well received.<sup>101</sup> This resistance was particularly intense in light of the wide-spread awareness that it would most likely be African Americans who would move into Ping Yuen if it were desegregated. Gilbert Woo, a rare integrationist voice within San Francisco's Chinese American community, condemned the anti-black comments he heard at community meetings about housing, and noted the tendency of many to condemn the rapidly

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<sup>100</sup> Shah, p. 242, Tang, Brooks.

<sup>101</sup> Brooks, pp. 191-92.

diminishing anti-Chinese prejudice in the City while saying nothing about discrimination against African Americans.<sup>102</sup>

In light of these attitudes, it is not surprising that San Francisco's Chinese American community's opinion about the issue of segregation in public housing diverged substantially from that of the City's civil rights groups. Even before Ping Yuen was completed, the local English-language Chinese American newspaper, the *Chinese Press*, endorsed the neighborhood pattern policy.<sup>103</sup> When the CCU, the Japanese American Citizens League, and the Urban League issued a resolution endorsing the desegregation of the City's public housing in 1950, no Chinese American organization signed on.<sup>104</sup> When the NAACP attempted to gain the support of these same groups for the Banks litigation, Chinatown's civic organizations were similarly absent.<sup>105</sup> Chinatown's residents voiced racist stereotypes about African Americans at community meetings concerning Ping Yuen's integration.<sup>106</sup> Indeed, San Francisco's Chinese language newspapers followed the litigation closely. After Judge Cronin's decision, the *Chinese Times* warned its readers that "[i]f the court forces the Housing Authority to allow black people to move in [and] . . . to get rid of their racial discriminations . . . then the **Ping Yuan** housing in Chinatown, which was originally reserved for Chinese people with 234 new apartments, will be forced to let whites and blacks live in them as well."<sup>107</sup> Perhaps most telling was the fact that the

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<sup>102</sup> Brooks, p. 192. General citations on Black-Chinese relations.

<sup>103</sup> Tang, "Becoming the New Objects of Racial Scorn," p. 237.

<sup>104</sup> Id., p. 190.

<sup>105</sup> Id., p. 191.

<sup>106</sup> Brooks, p. 225.

<sup>107</sup> "Gāo děng yá pàn jué: píng mǐn jū gé lí hēi rén wéi bù hé fǎ" (Superior Court Declares Segregating Black People in Public Housing is Illegal), *Chinese World*, October 3, 1952, p. 6 (emphasis in original). For other articles on the Banks case in the Chinese-language press, see: MORE.

Housing Authority's unanimous decision to defend the neighborhood pattern policy included the vote of the Authority's one non-white member, Charles Jung, president of the Chinese American Citizens Alliance, and a director of the Chinatown Chamber of Commerce.<sup>108</sup>

African American leaders in the City were furious with this resistance within Chinatown to the integration of public housing. J. Maceo Green, who wrote a weekly opinion column for the *Sun Reporter*, accused Chinese Americans of free-riding on the legal work of the NAACP and other civil rights organizations – taking the benefits of the fight against housing discrimination while refusing shoulder any of the burden of the struggle.<sup>109</sup> The *Sun Reporter's* editorial page aimed its wrath at Jung. “It is significant that not one member of the whole commission . . . raised his voice for democracy, although it has at least one member of a minority group.”<sup>110</sup> Jung's acquiescence to the Authority's racism demonstrated that Chinese Americans might not be truly committed to civil rights: “The Negro stands in the vanguard of the vigorous struggle against advocates of this undemocratic practice, whereas members of some other minority groups submit supinely, [and] even request segregation.”<sup>111</sup>

The *Sun Reporter's* assertions, tinged with their own racist assertion of Chinese timidity, were only partially correct. San Francisco's Chinese American community did request segregation, but in doing so it was not being timid. Nor was it, from its own perspective, acting undemocratically. To the contrary, Ping Yuen was proof that when the community asserted its

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<sup>108</sup> For biographical information on Jung, see San Francisco City-County Record vol XX, p. XX (get specific cite: here is url<http://www.ebooksread.com/authors-eng/pacific-publication-company/city-county-record-volume-v22-1955---v24-nov-1957-fna/page-89-city-county-record-volume-v22-1955---v24-nov-1957-fna.shtml>). On his vote, see the *Sun Reporter's* angry editorial. “S.F. Housing Authority Earns a Well Desired Rebuke,” *Sun Reporter*, September 5, 1953, p. 8. To his credit, Jung voted against appealing the Court of Appeals' decision. “Housing Group Splits. CCU Head Denounces Authority's Policy,” *Sun-Repoter* September 26, 1953, p.1.

<sup>109</sup> Tang, p. 238.

<sup>110</sup> Id.

<sup>111</sup> Id.

own interests within San Francisco politics, it could get public benefits that would have been inconceivable prior to World War II. What could be more democratic than an interest group pursuing its own self-interest?<sup>112</sup> Indeed, to many within the Chinese community, what they were doing was no different than what San Francisco's African Americans had done a decade earlier where they had gotten "their" housing project in the Western Addition.<sup>113</sup>

Nor would members of the Chinese American community have agreed with Maceo Green's assertion that they benefitted from the African American freedom struggle without engaging in the struggle itself. Ping Yuen's existence was proof positive of the success of Chinese American civil rights advocacy. It was, in the words of a *Chinese Press* editorial, "America's pledge that a century-old wrong has been righted."<sup>114</sup> What Maceo did not understand was that the civil rights strategies of the two communities were different. The Chinese American definition of equal protection was more in line with that of the Housing Authority – proportional allocation of a limited public asset in a fashion that allowed each group to maintain its cultural identity. The differing political strategies of the two communities thus had different legal analogues. What looked to some like a timid surrender to the racist norm of separate but equal, was in fact an assertion of a strong preference based on a variety of factors – some anti-black racism, to be sure, but also the economic, linguistic, and cultural reality of living within San Francisco's Chinatown.

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<sup>112</sup> For an examination of the postwar enthusiasm for interest group pluralism, see, Reuel Schiller, "Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970," 53 Vand. L.Rev 1389, 1399-1401 (2000); Reuel Schiller, "From Group Rights to Individual Liberties: Postwar Labor Law, Liberalism, and the Waning of Union Strength," 20 Berk. J. of Lab. and Employ, L. 1, 11-13 (1999).

<sup>113</sup> Brooks, p. 226. Choy interview.

<sup>114</sup> Cited in Brooks, p. 191, Shah, p. 240.

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The *Banks* case was a major legal victory for the NAACP. As with many such victories, however, its real-life effect was negligible. The Housing Authority complied with the decision with nothing more than a token integration of its properties, moving a handful of Chinese American and Japanese American families into previously all-white projects, while continuing to ignore requests from African American applicants for placement outside of housing they were traditionally assigned to.<sup>115</sup> Ping Yuen's demographics remained unchanged. Indeed, the number of people of non-Chinese ancestry in the census tract in which Ping Yuen sits decreased between 1950 and 1960.<sup>116</sup> In the early 1960s, California Attorney General Stanley Mosk received numerous complaints about Ping Yuen's racial make-up, and tried, with limited success, to negotiate the admission of a limited number of non-Chinese families to the project.<sup>117</sup> San Francisco's public housing did not become genuinely integrated until the 1980s. Even now, 86% of the residents of the Ping Yuen projects are from Asia.<sup>118</sup>

The ultimate futility of the *Banks* case does not, however, detract from its historical significance. Indeed, the fact that Ping Yuen remained segregated for decades after the case was decided illustrates a significant point about the development of a racially egalitarian political order in the United States: civil rights history looks different when viewed through a multi-racial lens. At a given time, different racial groups may have different definitions of equality and

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<sup>115</sup> Brooks.

<sup>116</sup> Cite to Chuck's data.

<sup>117</sup> Braitman and Uelmen, Mosk bio, pp. 94-95.

<sup>118</sup> HUD documents

different approaches to achieving it.<sup>119</sup> The *Banks* case demonstrates that there are legal analogues for these different definitions. The conflict between the Chinese American community and the African American community over public housing was made manifest in different interpretations of the equal protection clause of the Fourteenth Amendment. One contribution that legal historians can make to the new, expanded conception of civil rights history is to discover such divergent readings of the Constitution, and to show how one reading comes to supplant the others -- how the conflict in the Tranquil Gardens helped to define what the equal protection clause has come to mean in modern America.

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<sup>119</sup> The temporal contingency of civil rights strategies is suggested by the fact that by the mid-1960s some within the African American community were increasingly sympathetic to the notion that the Constitution should allow the state to give African Americans their own public benefits to manage for their community as it saw fit, even if they would have rejected the Chinese American emphasis on assimilation. See Sugrue, *Sweet Land of Liberty*, pp. XX-XX.